Supreme Court, U.S.
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No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN
ex rel. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Michigan

BRIEF FOR PETITIONER

STEFAN B. HERPEL
206 S. Fifth Ave., Suite 200
Ann Arbor, MI 48104
(313) 930-0852
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property if it is used in a proscribed manner by another person even if the owner had no knowledge of, or culpability in connection with, the misuse of the property violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment); and

2. Whether the application of that statute to deprive a wife of her interest in an automobile she jointly owned with her husband violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the forfeiture resulted from a finding that the husband engaged in a sex act with a reputed prostitute inside the automobile, and where the record established that the wife had no knowledge of or culpability regarding her husband's proscribed use of the vehicle.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the United States Supreme Court)

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Michigan Supreme Court (J.A. 45) is reported at 447 Mich. 719, 527 N.W.2d 483 (1994). The opinion of the Michigan Court of Appeals (J.A. 29) is reported at 200 Mich. App. 670, 504 N.W.2d 731 (1993). The ruling of the trial court, which was made from the bench (J.A. 13) and implemented by a one-page order (J.A. 27), is unreported.

JURISDICTION

The Michigan Supreme Court entered judgment on December 30, 1994. The petition for a writ of certiorari

was filed on March 29, 1995, and was granted on June 5, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "nor shall private property be taken for public use, without just compensation."

The statute involved in this case is codified as amended in the Michigan Compiled Laws Annotated at § 600.3801 et seq. (1981 and Supp. 1995). The specific statutory provisions referred to in the brief, including § 3815(2) and § 3825(2), are reproduced in full as they appear in Michigan Compiled Laws Annotated in an appendix to this brief.

STATEMENT OF THE CASE

Petitioner Tina Bennis and her husband, John Bennis, who resided together in a suburban Detroit community, were joint owners of a 1977 Pontiac. Tina Bennis had provided most of the money used to purchase the car through babysitting and similar jobs. (J.A. 11).

On the evening of October 3, 1988, Mr. Bennis was arrested for gross indecency while he was in the Bennis

car, which was parked on a Detroit street. The arresting officers testified that they approached Mr. Bennis's parked car, illuminated the inside with a flashlight, and observed a woman performing fellatio on Mr. Bennis in the front seat of the car. (R. 29, Trial Transcript at 67-68). Arrest records later showed that the woman had had prior arrests for, *inter alia*, accosting and soliciting. (Trial Transcript at 72-73).

The Bennis's car was seized and the Wayne County Prosecutor,[1] acting in the name of the State of Michigan, filed a civil action against Tina and John Bennis seeking, *inter alia*, a finding that the Bennis vehicle was an abatable public nuisance under a Michigan statute and that it was therefore subject to forfeiture. (J.A. 2) The nuisance abatement proceeding took place on November 2, 1988, just weeks after the complaint was filed by the Wayne County Prosecutor.[2] The respondent sought forfeiture of the Bennis's interest in their car by reason of the single instance of misconduct engaged in by Mr. Bennis in the automobile. The *Bennis* case was the first case tried under a newly implemented Wayne County automobile seizure policy. (J.A. 13). Never before in its history had that

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[1] Wayne County is the county in Michigan that includes within its boundaries the city of Detroit and a number of suburban communities.

[2] Mr. Bennis pled guilty to a misdemeanor indecency charge on January 27, 1989, and was fined $250 and ordered to perform community service. *See* Order of Probation in *People of the State of Michigan v. Bennis*, No. U-325784 (36th District Court, Jan. 27, 1989). The Michigan Supreme Court opinion erroneously implies that Mr. Bennis's conviction preceded the civil nuisance abatement proceeding. (*See* J.A. 47).

statute been invoked to justify the confiscation of a vehicle used to visit a house of prostitution or to otherwise engage the services of a prostitute. (J.A. 90) (Levin, J., dissenting).

The Michigan public nuisance abatement statute (sometimes referred to herein as "the Act") declares specified uses of property to be a "nuisance," M.C.L.A. § 600.3801 (Supp. 1995),[3] and authorizes the state attorney general or a county prosecuting attorney to bring a civil action for equitable relief to abate the nuisance. *Id.* § 600.3805. In addition to the traditional equitable remedy of an injunction to enjoin the nuisance, *see* §§ 600.3801; 600.3805, the Act provides for the forfeiture of certain property found to have been used for the purpose of creating a nuisance. *Id.* § 600.3825.

Under the Act, the use of "any building, vehicle, boat, aircraft or place" for, *inter alia*, the purpose of lewdness, assignation or prostitution or gambling," constitutes a nuisance. *Id.* § 600.3801. If it is established that a "vehicle, boat or aircraft" was used in a manner that constitutes a nuisance, the Act provides that an order of abatement "shall be entered" providing for the forfeiture of that property. *Id.* § 600.3825(1), (2). Under the Act, the proceeds of the sale of forfeited vehicles, boats, and aircraft are to be applied first to cover the costs of keeping and selling the property, and then to lienholders who had no notice of the misuse of the property, with the balance

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[3] M.C.L.A. § 600.3801 and the other sections of the statute cited herein are reproduced in full in an appendix to this brief.

going to the State. *Id.* § 600.3825(3). The statute specifically provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." *Id.* § 600.3815(2). Because the proceeding is "civil" and "equitable" in form, most of the procedural protections available in criminal cases, including the right to a jury trial, are not applicable. (R. 29, Trial Transcript at 39) (denying request for jury trial); *see also* Michigan Court Rule 3.601 (1995).

At the nuisance abatement trial, Tina Bennis testified that she did not have any knowledge of her husband soliciting prostitutes. (J.A. 9). She further testified that, on the day he was arrested, she had no knowledge that he was going to do anything but come directly home from work, as he always had before. (J.A. 9, 11-12). Respondent conceded on appeal that "the lower court transcript did not show knowledge on the part of Mrs. Bennis . . . ." (Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 29).

The trial court found that John Bennis had engaged in an act of lewdness (J.A. 23), and ruled that both his ownership interest in the Bennis vehicle and that of Tina Bennis would be forfeited (J.A. 25-26), despite her lack of knowledge of the misuse.[4] The court ordered the vehicle

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[4] The trial judge made very few findings regarding the property interest of petitioner in the Bennis vehicle, and at one point suggested rather arbitrarily that the rights of an innocent owner would vary depending on the existence of "a different situation, different car, age of car, value, so forth." (J.A. 26). The trial judge said that in other circumstances, "[he] would consider the concerns of Mrs. Bennis . . . ." (J.A. 25). He ruled that he

to be sold, and the proceeds to be used to cover the costs incurred by the Wayne County Prosecutor and the Detroit Police Department, with any balance to be paid to the State of Michigan. (J.A. 26, 28). The trial court file contains no accounting of the amount and disposition of any proceeds realized from the sale of the vehicle.

The Michigan Court of Appeals reversed the trial court's order of forfeiture on statutory grounds in a 2 to 1 decision. (J.A. 29). The Michigan Court of Appeals held that proof of a single incident of "lewdness, assignation, or prostitution" was insufficient to establish a nuisance, and, moreover, that the Wayne County Prosecutor had failed to demonstrate that a prostitution related offense had occurred. (J.A. 33-34, 35). The Court of Appeals also construed the nuisance abatement statute to require the County to prove knowledge on Tina Bennis's part that her husband used the vehicle for a purpose proscribed by the statute. (J.A. 32). It held that "the record in this case does not support a finding that Mrs. Bennis knew the vehicle was being used for such [a] purpose." (J.A. 32). This alternative holding meant that, even assuming *arguendo* that forfeiture of the vehicle was otherwise proper, forfeiture of Tina Bennis's interest in the vehicle was not. Because the Michigan Court of Appeals decided the statutory issues in favor of John and Tina Bennis, it was not necessary to reach any constitutional issues relating to the confiscation of Tina Bennis's interest in the car.

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would not do so in this case because the Bennis family had another vehicle, and because, after deducting court costs from the sale proceeds, there would be "practically nothing left" to compensate petitioner for her interest in the vehicle. (J.A. 25).

The Michigan Supreme Court granted leave to appeal and reversed the judgment of the Michigan Court of Appeals in a 4 to 3 decision upholding the forfeiture. (J.A. 45). Of the four justices voting to uphold the forfeiture, three joined a plurality opinion and a fourth concurred in the result only, without writing separately. The *Bennis* opinion disagreed with the Court of Appeals' ruling on the statutory issues and rejected Tina Bennis's constitutional claim that the forfeiture of her interest violated the Due Process and Takings Clauses. The Justice who provided the fourth vote for reversal necessarily must have rejected Tina Bennis's constitutional claim as well.[5]

The plurality opinion first concluded that an act of "lewdness, assignation, or prostitution" within the meaning of the nuisance abatement statute had occurred in the vehicle. (J.A. 48-54). It then construed the Act to permit a forfeiture based upon a single act of lewdness in connection with an act of prostitution, as long as the driver "entered into and thereby contributed to an existing condition that is a public nuisance." (J.A. 59). These conclusions were dispositive of the issues regarding the forfeitability of Mr. Bennis's interest in the automobile.

Addressing the forfeiture of Tina Bennis's interest in the vehicle, the plurality opinion, construing what it said

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[5] The plurality opinion was written by Justice Riley and joined by Justices Boyle and Mallett. Justice Griffin concurred in the result only. Chief Justice Cavanagh wrote a dissenting opinion that was joined by Justices Brickley and Levin. (J.A. 71). The dissent was also unpersuaded by Tina Bennis's constitutional claim, at least to the extent it was grounded in due process. (J.A. 80-81 & n.8). Justice Levin wrote a separate dissenting opinion that dealt exclusively with statutory issues. (J.A. 88).

was "the plain language of the nuisance abatement statute," concluded that it "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property." (J.A. 65). The opinion did not purport to disturb the Court of Appeals' holding that the record did not support a finding of knowledge on the part of Tina Bennis. The Court assumed for the purposes of its analysis that she "did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner." (J.A. 66). But because the opinion concluded that, under the "plain language" of the statute, the owner's knowledge of or consent to the misuse of the property was immaterial, forfeiture of Tina Bennis's interest was deemed to be statutorily authorized. (J.A. 63-66).

The Michigan Supreme Court opinion then addressed whether the nuisance abatement statute or its application to Tina Bennis's interest in the automobile violated the United States Constitution. (J.A. 66). Tina Bennis argued in the Michigan Supreme Court that, because she was an innocent owner of the automobile, the Due Process Clause of the Fourteenth Amendment, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest. (*See* Defendants-Appellees' 7-14-94 Brief in the Michigan Supreme Court at 14, 15 & n.11, 16).

Relying principally on two decisions of this Court, the Michigan Supreme Court rejected Tina Bennis's constitutional claim. Those two decisions were *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and a Prohibition-era case, *Van Oster v. Kansas*, 272 U.S. 465 (1926). The *Bennis* opinion read *Pearson* and *Van Oster* as

establishing that a person's interest in property can constitutionally be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the owner has any culpability (including negligence) for the illegal use. (J.A. 69) ("The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.") The *Bennis* opinion concluded that, under this Court's decisions, forfeiture of an innocent owner's property would be constitutional, so long as he or she "consented to the use [of the property]," even if "it [was] used in a *manner* to which the owner did not consent." (J.A. 69, n.36) (emphasis in original).

The Michigan Supreme Court opinion stated that the facts of the case precluded any reliance by Tina Bennis on the sole constitutional exception to forfeiture that was recognized by the Court – use without the consent of the owner. (J.A. 68). The opinion therefore concluded that the application of the statute to deprive Tina Bennis of her interest in the car gave rise to "no constitutional violation . . . ." (J.A. 69). It also concluded that "the [Michigan nuisance abatement] statute unquestionably passes constitutional muster." (J.A. 71).

Petitioner subsequently petitioned this Court for certiorari in a petition filed on March 29, 1995. Certiorari was granted by this Court in an order dated June 5, 1995. (J.A. 98)

SUMMARY OF ARGUMENT

This case arises from the forfeiture of Tina Bennis's property, pursuant to a statute that authorizes forfeitures regardless of the owner's culpability regarding its wrongful use, and in circumstances that demonstrate unequivocally that petitioner had no culpability. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court addressed in dicta whether the property of an owner wholly innocent of culpability may be forfeited consistent with the Due Process Clause. That dicta implicitly recognizes that, where the forfeiture statute at issue serves punitive purposes, the State may not forfeit property on the basis of its misuse by another person, unless the owner had some culpability at least amounting to negligence in connection with the unlawful use. The principle implicit in the dicta – that the State has no legitimate interest in punishing one who is entirely innocent – is axiomatic to our legal tradition and consistent with other decisions of the Court interpreting the Due Process Clause.

The Court's recent decision in *Austin v. United States*, 509 U.S. ___, 125 L. Ed. 2d 488 (1993) provides additional support for recognition of such a due process limitation on forfeiture by having acknowledged that, historically, forfeitures have served as punishment for personal culpability. Moreover, the *Austin* decision demonstrates incontrovertibly that forfeitures under the Michigan nuisance abatement statute impose punishment, and therefore that due process prohibits the statute from authorizing forfeitures of blameless property owners. Application of that due process principle here requires

reversal of the opinion below, because petitioner's property was forfeited as punishment for an act in regard to which she was truly innocent.

The Court has never had occasion to apply the negligence standard set forth in the *Pearson* dicta, and the lower courts have interpreted it in widely divergent ways. The *Austin* decision intimates that an appropriate standard is provided by the common law tort of negligent entrustment. Because of the historic importance of property rights, the need for a clear, uniform standard to guide the lower courts, and the need to avoid "unduly oppressive" confiscations of property from innocent owners like Tina Bennis, the Court should adopt the negligent entrustment standard as the measure of culpability required to satisfy due process in these circumstances.

Under this standard, which can be adapted from the negligent entrustment rule set forth in Restatement (Second) of Torts § 308, Tina Bennis is unquestionably an innocent owner. The forfeiture of her property interest in her automobile therefore violated due process. And section 3815(2) of the Michigan statute, which authorizes the forfeiture of property of innocent owners, must be declared unconstitutional.

The Takings Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, provides an alternative basis for reversing the decision below. The *Pearson* dicta implies that the forfeiture of property of an owner free of any blameworthy conduct, including negligence, would violate the Takings Clause insofar as it forces non-culpable parties to suffer takings

of their property to finance costs of law enforcement and other general activities of the State that should "in all fairness and justice" be borne by the public as a whole. The forfeiture of Tina Bennis's interest in the Bennis automobile was a direct appropriation of her property by the State and she is constitutionally entitled to "just compensation" for that taking. With respect to the facial challenge to the Michigan nuisance statute, section 3815(2) must also be declared unconstitutional as violative of the Takings Clause for similar reasons.

This Court cannot satisfactorily resolve the issues raised by Tina Bennis's facial challenge to the statute without addressing which party should bear the burden of proof with respect to the constitutionally required degree of culpability. The State in the proceedings below sought to place that burden on defendant owners such as Tina Bennis. The issues of the appropriate standard for culpability and the burden of proof allocation are inseparable, both with regard to the principle that protects an innocent person from being punished, and in practical terms. Our legal tradition not only prohibits a State from establishing a procedure that punishes without regard to culpability. It also precludes the government from establishing a procedure that administers the sanction of punishment without the State first proving that some culpable act occurred. And from a practical standpoint, if the Court rules that due process requires some culpability before forfeitures can be effected under the Michigan statute, and yet the State is permitted to place the burden of proving lack of culpability on the defendant, the substantive standard for culpability will be seriously compromised in its application.

Application of the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates that due process requires the State to bear the burden in *in personam* forfeitures under the Michigan nuisance abatement statute. That conclusion is reinforced by the quasi-criminal nature of nuisance abatement proceedings. This Court's recent Takings Clause jurisprudence likewise supports placing the burden of proving the constitutionally required degree of culpability on the State.

ARGUMENT

I. THE MICHIGAN STATUTE AND ITS APPLICATION TO TINA BENNIS, RESULTING IN FORFEITURE OF HER INTEREST IN THE AUTOMOBILE, VIOLATED DUE PROCESS

Petitioner Tina Bennis was never found to have engaged in – nor even alleged to have engaged in – any wrongful conduct. The State nevertheless forfeited her property, pursuant to a nuisance abatement statute that expressly authorizes property forfeitures of owners innocent of any blameworthy conduct. Because the Michigan statute authorizes punishment of innocent persons, the statute violates due process. Therefore, the offending provision of the statute, at least, must be struck down. And because the facts of this case demonstrate unequivocally that Tina Bennis is blameless, the application of the statute to forfeit her interest in the automobile likewise violated due process. The Michigan Supreme Court decision upholding the constitutionality of the statute and its application to Tina Bennis must therefore be reversed.

A. This Court Has Implicitly Recognized That The State Has No Legitimate Interest in Punishing Through Forfeiture Owners Who Are Completely Without Culpability.

This Court addressed the constitutionality of forfeiture of a truly innocent owner's property in dicta in *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663 (1974). In *Pearson*, the Pearson Yacht Leasing Company leased a pleasure yacht to two Puerto Rican residents. Puerto Rican authorities discovered marijuana on board the yacht, and seized the yacht, pursuant to the Commonwealth's civil forfeiture statute.[6] The Puerto Rican authorities conceded that Pearson was uninvolved in and unaware of the wrongful activity of its lessee. *Pearson*, 416 U.S. at 668. Pearson challenged the forfeiture statute on the grounds, *inter alia*, that it "unconstitutionally authorized the taking for government use of innocent parties' property without just compensation."[7] *Id.* at 680.

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[6] The Puerto Rican statute at issue in *Pearson* was modeled after the federal drug forfeiture statute, 21 U.S.C. § 881(a), as those provisions existed in 1973. *Pearson*, 416 U.S. at 686 n.25. At that time, as to persons other than common carriers, the statutory "innocent owner" defense was limited to those who could establish that the illegal use was committed by somebody "unlawfully in the possession" of the conveyance. *Id.*

[7] The yacht leasing company also challenged the constitutionality of the seizure of their yacht on the grounds that the company had not been given pre-seizure notice and an opportunity to be heard. *Pearson*, 416 U.S. at 668. The Court's rejection of that separate constitutional claim is not relevant to the issues presented by this petition for certiorari.

The Supreme Court rejected Pearson's takings claim. In so doing, the Court noted that the Puerto Rican forfeiture statute furthered the "punitive and deterrent purposes" of the "underlying criminal statutes." *Id.* at 686-87. The Court stated that the rationale for applying such forfeiture provisions to "lessors, bailors or secured creditors" who have no direct complicity in the wrongdoing is that it "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 687-88.

Although it rejected the facial challenge to the forfeiture statute, the Court did suggest in dicta that some culpability at least amounting to negligence must be present before the government could confiscate property that was entrusted by an owner to another person, who in turn misused it without the knowledge or participation of the owner:

> It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, *the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property;* for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90 (emphasis added) (citations and footnote omitted). The italicized portion of the dicta quoted above sets forth a three-pronged test to determine whether one has the necessary culpability to justify a forfeiture. A

person who 1) was uninvolved in the wrongful conduct, 2) had no knowledge of it, and 3) took reasonable steps to prevent the proscribed use will not have the requisite culpability. The third prong of the *Pearson* dicta requires some kind of negligence on the part of an otherwise innocent property owner before his or her property can be forfeited. *See Austin v. United States*, 125 L. Ed. 2d at 502, 503 (effectively equating third prong of *Pearson* dicta with "idea that owner has been negligent").[8] The Court in *Pearson* recognized that the forfeiture statute at issue served "punitive" purposes, 416 U.S. at 686, and the dicta can be read as reflecting the Court's implicit view that, with respect to persons wholly free of culpability, punishment serves no "legitimate purposes," *id.* at 690.

The implicit view expressed in *Pearson* that the State has no legitimate interest in the punishment of persons who have not engaged in some blameworthy or culpable conduct is, of course, axiomatic to our legal tradition.

[8] In *Austin*, the Court examined the two theories on which forfeiture of an apparently innocent owner's property had been justified in prior decisions: the "guilty-property fiction," 125 L. Ed. 2d at 502, and the notion that an owner may be held liable for "the wrongs of others to whom he entrusts his property," *id.* at 503. With respect to the guilty-property fiction, the Court stated that it had not used that fiction to justify forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 502. As for the second theory, the Court stated that, "[l]ike the guilty-property fiction, this theory . . . is premised on the idea that the owner has been negligent." *Id.* at 503.

And, while the *Pearson* Court's invocation of this principle appeared only in dicta, this Court has in other contexts recognized the due process right of an innocent individual to be free of punishment. In *Foucha v. Louisiana*, 504 U.S. 71 (1992), for example, the Court, relying on substantive due process principles, held that once a criminal defendant is found not guilty of a crime, the State may not impose punishment.[9] *Id.* at 80. In this situation, the Court said, the State simply has no "punitive interest." *Id.* Likewise, in *Bell v. Wolfish*, 441 U.S. 520 (1978), the Court held that the constitution prohibited the punishment of criminal defendants who were being detained pending trial on criminal charges. The Court unequivocally stated, "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt . . . ." 441 U.S. at 535. Because "retribution and deterrence are not legitimate . . . governmental objectives" in this context, the Court stated that officials of the detention facility "cannot" constitutionally impose punishment on pre-trial detainees. *Id.* at 539, n.20; *see also id.* at 580 (Stevens, J., dissenting) (regarding the innocent

[9] In *Foucha*, a criminal defendant was found not guilty of the commission of a crime by reason of insanity. *Foucha*, 504 U.S. at 74. He was committed to a forensic facility and kept there indefinitely pursuant to a Louisiana statute despite subsequent medical findings that he was no longer mentally ill. *Id.* at 74-75. The Court held that continued detention under the statute constituted punishment, which the State had no power to inflict, *id.* at 80, and held the statute to be unconstitutional, *id.* at 83.

person's "right to be free of punishment" as an "obvious and indisputable" component of due process).[10]

Thus, the *Pearson* recognition that the government has no legitimate interest in forfeiting a person's property for the purposes of punishment if that person is blameless is firmly grounded in the Due Process Clause,[11] and should be recognized as a constitutional requirement by this Court.[12]

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[10] Justice Stevens's dissent and the majority opinion appeared to agree on the fundamental soundness of this due process principle.

[11] Although the constitutional *holding* rendered by the *Pearson* Court concerned the Takings Clause, a number of lower courts have assumed that the *dicta* provides a due process limitation on property forfeiture of innocent owners. *See, e.g., United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 33 (2d Cir. 1992), *cert. denied, Levin v. United States*, 121 L. Ed. 2d 24 (1992); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 900-01 (8th Cir. 1977); *United States v. One 1982 Oldsmobile Cutlass*, 709 F. Supp. 1542, 1551 (W.D. Okla. 1989), *modified on other grounds*, 739 F. Supp. 1490 (W.D. Okla. 1989).

[12] The Court's holding in *Austin v. United States* that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture under 21 U.S.C. § 881(a) offers another basis for concluding that innocent owners have constitutional protection from forfeiture. The Eighth Circuit decision under review in *Austin* had assumed that forfeiture of the property of an innocent owner was constitutional, and had concluded *a fortiori* that the Eighth Amendment did not require proportionality review of the forfeiture of culpable owner's property. *Austin*, 125 L. Ed. 2d at 495. By holding that the Eighth Amendment was applicable to civil forfeitures, the Court implicitly rejected the premise that the property of a truly innocent owner can be forfeited. At the very least, the Court's holding that the Eighth Amendment applies to civil forfeitures because they constitute punishment would be difficult to reconcile with any rule allowing truly

The Court's recent decision in *Austin* establishes that there is a historical basis for the due process principle implicitly recognized in *Pearson*. The Court in *Austin*, reviewing nearly two centuries of its forfeiture jurisprudence, concluded that its decisions have "consistently . . . recognized that forfeiture serves, at least in part, to punish the owner" for personal culpability. 125 L. Ed. 2d at 503; *see also id.* at 500-502. Besides providing a historical analysis that supports a due process-based prohibition against the use of forfeiture to punish blameless owners, the *Austin* decision demonstrates conclusively that forfeiture under the Michigan statute is punishment, and hence that the statute is subject to that constitutional prohibition.

Austin held specifically that civil forfeiture under two widely used provisions of the federal drug forfeiture statute – 21 U.S.C. § 881(a)(4) and § 881(a)(7) – constitutes punishment. 125 L. Ed. 2d at 505. The Court's rejection of the government's contention that these provisions are "remedial," rather than "punitive" in nature, *id.* at 504-05, applies with equal force to the forfeiture provisions of the Michigan statute. The conveyances referred to in

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innocent persons to be punished by civil forfeiture. Because the concept of proportionality review presupposes some culpable conduct against which to measure the nature and severity of the punishment, proportionality review could not apply to cases in which the owner has no culpability of any kind. To hold that the constitution requires "excessiveness" scrutiny of forfeitures of property belonging to blameworthy owners, but puts no limitation whatsoever on whether, and to what extent, property can be forfeited from a wholly innocent owner, would be anomalous.

§ 881(a)(4) ("aircraft, vehicles or vessels") are virtually identical to those referred to in § 3825(2) of the Michigan statute ("vehicle, boat, or aircraft"). Because their value can vary dramatically, forfeiture of such property cannot be regarded as "remedial" in the sense of reimbursing government for the costs of law enforcement. *Austin*, 125 L. Ed. 2d at 505. And because the possession of conveyances such as cars is perfectly legal, and inasmuch as conveyances have many legitimate uses, any analogy to the remedial purpose of seizing contraband must also fail.[13] *Id*. Like forfeitures under §§ 881(a)(4) and 881(a)(7), forfeitures under the Michigan statute are undeniably "punishment." As such, due process forbids the statute from authorizing the confiscation of property of somebody like Tina Bennis who has no culpability whatsoever regarding the wrongful use of her property.

Moreover, the State has acknowledged in the proceedings below that forfeitures in this context are punitive, and that the nuisance abatement proceeding is nothing more than a low-cost substitute for a prosecution of the underlying crime. In its brief on appeal to the Michigan Supreme Court, respondent stated:

> There also exists a policy reason why the lower [trial] court decision should be affirmed. Confiscation of an automobile in the context that defendant's car was seized has an immediate effect upon the nuisance "market," driving

[13] The invalidity of the analogy is further demonstrated by the fact that, under the Michigan statute and forfeiture statutes generally, the confiscated cars are not destroyed, but are sold to members of the public, and the sale proceeds are deposited into public treasuries.

> away the customers and depriving the vice sellers (prostitutes) of buyers. It is a prime example of an inexpensive, cost-effective, non-docket-clogging alternative to prosecution and imprisonment. *In effect, it is swift and certain "punishment" of the voluntary vice consumer. Recidivism is practically nil, and the deterrence value is great.*

(Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 22) (emphasis added). Besides demonstrating that the sanction of forfeiture is punishment, this statement of "policy" by the State confirms that the civil nuisance proceeding serves the same purposes as a criminal "prosecution," albeit without the usual procedural protections that would apply in a criminal proceeding. In other words, the nuisance abatement statute not only imposes punishment in a civil proceeding, but imposes it as a sanction for criminal wrongdoing. The forfeiture proceeding is, in accordance with the State's above characterization, "the functional equivalent of a . . . criminal prosecution . . . ," *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 782 (1994).

B. The Michigan Supreme Court Rule Regarding The Constitutional Limits To Forfeiture Does Not Accord With The Requirements Of Due Process.

The Michigan Supreme Court justified the constitutionality of the Michigan statute and its application to Tina Bennis by reading *Pearson* and another decision of this Court, *Van Oster v. Kansas*, 272 U.S. 465 (1926), as

establishing that forfeiture of an innocent owner's property would be constitutional, as long as the owner "consented to the use [of the property]" even if "it [was] used in a *manner* to which the owner did not consent." (J.A. 69 n.36) (emphasis in original). The *Bennis* opinion concluded that, where a person's property is misused by another in a manner that was not authorized by the owner, the United States Supreme Court "indisputably" allows forfeiture of the property, unless "evidence [is] submitted that the property was stolen or used without the consent of the owner." (J.A. 69). This rule would authorize the forfeiture of property from persons who are innocent even of negligence in entrusting their property to another. To that extent, it squarely contradicts the substantive constitutional standard for culpability that is reflected in the *Pearson* dicta and required by due process.

The Michigan Supreme Court's reliance on *Van Oster* cannot vindicate the constitutional rule it purported to adopt in the *Bennis* opinion. *Van Oster* involved an owner's Fourteenth Amendment due process challenge to the forfeiture of her automobile based on an illegal use (the transportation of liquor) by another person. Citing, *inter alia*, *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921), and *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878), the Court held that the forfeiture was "within the limits of due process." 272 U.S. at 468. To the extent that *Van Oster* stands for the proposition that the forfeiture of property of owners who are completely blameless is consistent with due process, that decision is no longer good law, at least where, as here, the statutory forfeiture scheme at issue serves the purpose of punishment. First, viewed against this Court's historical analysis

of forfeiture in *Austin*, this case seems to be an aberration. In *Austin*, the Court indicated that each of the two theories traditionally used to justify forfeiture is predicated on the negligence of the owner in permitting misuse of his property. 125 L. Ed. 2d at 501. Moreover, *Austin's* characterization of the holdings in *Goldsmith-Grant Co.* and *Dobbins's Distillery*, both of which were relied upon in *Van Oster*, simply cannot be reconciled with the suggestion that forfeiture can be visited upon non-negligent owners. Referring to *Goldsmith-Grant Co.*, *Dobbins's Distillery*, and other decisions, the Court in *Austin* stated that "[i]n none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 502. Finally, the Prohibition-era decision in *Van Oster* predates this Court's more recent recognition that due process prohibits the government from punishing those who are innocent of any blameworthy conduct. *Van Oster* simply cannot be used to justify either the constitutional rule or holding in *Bennis*.

C. Because The Record Demonstrates That Tina Bennis Is An Innocent Owner Under The Applicable Standard For Culpability, Forfeiture Of Her Property Interest Violated Due Process.

The Supreme Court has never had occasion to determine the proper application of the negligence prong of the *Pearson* dicta, and thereby to determine the minimum culpability an owner like Tina Bennis must have before

property can be forfeited.[14] In *Austin*, however, the Court discussed in some detail the kind of owner negligence that has traditionally been required in order to justify forfeiture of an owner's property based on the wrongful acts of others. Based on that discussion, a standard for negligence grounded in the common law tort of "negligent entrustment" clearly emerges.

The Court stated in *Austin* that holding the owner "accountable for the wrongs of others to whom he *entrusts* his property" rests "on the notion that the owner has been *negligent* in allowing his property to be misused and that he is properly punished for that negligence." 125 L. Ed. 2d at 501 (emphasis added). If, as *Austin* stated, the nature of the culpable conduct needed to justify the punishment of property forfeiture is negligence in entrusting the property to another, then the common law tort of negligent entrustment provides an appropriate standard for determining culpability. That tort addresses "negligence" in "entrusting" one's property to another, who harms a third person while using it. Use of that standard is also consistent with the *Pearson* Court's statement that the purpose of applying forfeiture provisions to owners who have no direct complicity in the wrongful use of

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[14] The *Pearson* decision itself, while rejecting the yacht leasing company's facial challenge to the Puerto Rican forfeiture statute, offered no opinion as to whether the company did or did not satisfy the negligence prong. Instead, the Court stated that "no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use," 416 U.S. at 690 (citation omitted), and on that basis reversed the lower court opinion, without remand on the negligence issue. *Id.*

their property is to "induc[e] them to exercise greater care in transferring possession of their property." 416 U.S. at 688.

Section 308 of the Restatement (Second) of Torts sets forth a "negligent entrustment" rule, which provides in pertinent part, as follows:

> It is negligence to permit a third party to use a thing . . . which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts § 308 (1965). By substituting the words "in a manner proscribed by law" for the words "in such a manner as to create an unreasonable risk of harm to others," the Restatement standard could easily be adapted to define the minimal degree of culpability an owner must have in order for a forfeiture to comport with due process. That rule would collapse the knowledge and negligence prongs of the *Pearson* dicta into a single, easily applied standard.

Both "fundamental fairness" and the historic importance of property rights in our legal and social tradition support the adoption of this standard or one similar to it. A property owner should not be at risk of losing his or her property for acts or omissions that, in analogous settings, would not even give rise to common law tort liability. Moreover, the articulation of a clear rule grounded in familiar tort law concepts would give federal and state courts needed guidance in determining the constitutional limits to forfeitures in cases where the forfeiture statute being applied contains no exemption for

innocent owners.[15] And, finally, adoption of this standard would help ensure that property owners like Tina Bennis are protected from "unduly oppressive," *Pearson*, 416 U.S. at 690, confiscations of their property.

Applying this standard to the record below demonstrates that Tina Bennis had no culpability regarding her husband's wrongful use of the Bennis car. With respect to whether Tina Bennis knew that her husband would use the car in the way he was found to have used it, respondent conceded in its appeal brief to the Michigan Supreme Court that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . . . " (Plaintiff-Appellant's 6-9-94 Brief on Appeal to the Michigan Supreme Court at 29). At the nuisance abatement trial,

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[15] The decisions of the lower courts reflect starkly conflicting interpretations and applications of the *Pearson* dicta. *See, e.g., United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386 (9th Cir. 1977) (reversing judgment of forfeiture); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) (disallowing forfeiture); *United States v. One 1974 Mercury Cougar*, 397 F. Supp. 1325 (C.D. Cal. 1975) (disallowing forfeiture); *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982) (affirming order of forfeiture); *United States v. Six Thousand Seven Hundred Dollars*, 615 F.2d 1 (1st Cir. 1980) (affirming order of forfeiture); *United States v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D. N.Y. 1984) (ordering forfeiture), *aff'd without opinion*, 762 F.2d 991 (2d Cir. 1985). In large measure, the disparate applications of the *Pearson* dicta reflect an inherent tension between the "lack of knowledge" and negligence prongs of the dicta. The existence of a duty to do "all that reasonably could be expected to prevent the proscribed use of [one's] property." *Pearson*, 416 U.S. at 689, arises primarily from an owner's knowledge of the likelihood of an impending misuse. The negligent entrustment standard advocated here would resolve that tension.

Tina Bennis testified that she had no knowledge of her husband soliciting prostitutes and that on the day of his arrest, she did not have any knowledge that he was going to do anything but come directly home from work. (J.A. 9, 11-12). Her testimony accords with the common sense observation that a wife would not have advance knowledge that her husband was planning to use their automobile in the manner John Bennis was found to have used it, even assuming that the husband had planned the act in advance. Nor is there any evidence in the record from which it could be inferred that Tina Bennis "should [have] know[n]" that John Bennis was "likely to use the [car]" in the manner the trial court found him to have used it.

Finally, Tina Bennis does not satisfy the "control" requirement of the Restatement rule. As a co-owner of the vehicle, John Bennis had a right to use it and did not need his wife's permission or authorization to do so. Because his use of the automobile did not depend on Tina Bennis's consent, and because she did not in any meaningful sense have the legal power to prevent his use, the car was not "under [her] control" for purposes of Restatement § 308.

Even if this Court did not employ § 308 as the standard for determining whether there has been a negligent entrustment of property that would justify forfeiture, the record does not support any finding that she was negligent under any other meaningful standard in connection with her husband's use of the vehicle. Whether one did all that could reasonably be expected to prevent a misuse is necessarily a function of whether one knew or should have known of another's criminal wrongdoing. *See United*

States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979). Indeed, if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use. As to Tina Bennis, it hardly requires argument that a wife would, as a matter of course, take all reasonable steps to assure her husband's fidelity.

Furthermore, the relationship between Tina Bennis and her husband was not a commercial relationship, and she did not stand to benefit financially or otherwise from the particular use he was found to have made of the car. She is not a member of the class of commercial entities – "lessors, bailors, or secured creditors" – that the *Pearson* Court referred to in justifying application of forfeiture provisions to those who have no direct complicity in the criminal use of their property. 416 U.S. at 688. This factor likewise supports a finding that she was a truly innocent owner. *See, United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1287 (E.D. Pa. 1986).

In addition, the fact that she lacked meaningful control over her husband's use of the property is another factor supporting the conclusion that Tina Bennis took all steps that "reasonably could be expected" to prevent the proscribed use. *See United States v. 6109 Grubb Road*, 886 F.2d 618, 627 (3rd Cir. 1989) (stating that application of the *Pearson* dicta is "particularly daunting where . . . entireties property is involved"), *reh'g en banc denied*, 890 F.2d 659 (3d Cir. 1989). Because the record reveals that Tina Bennis had no culpability whatsoever in connection with her husband's wrongful use of the family car, the judgment of the Michigan Supreme Court upholding the

forfeiture of her ownership interest in the automobile must be reversed.

D. The Michigan Nuisance Abatement Statute, Or At Least § 3815(2), Must Be Declared Unconstitutional

The Michigan Supreme Court's ruling that the nuisance abatement statute is constitutional (J.A. 70, 71) must also be reversed insofar as it upholds § 3815(2) of the Act.[16] That section provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants . . . is not required." M.C.L.A. § 600.3815(2). The Michigan Supreme Court opinion construed the "plain language" of this section to authorize forfeitures regardless of whether the owner had knowledge of, or consented to, or was in any other way blameworthy regarding the illegal use of his or her property. (J.A. 63, 65); *see also* Respondent's Brief in Opposition to Petition for Certiorari at 5 (stating that in contrast to other statutes with innocent owner exemptions, "Michigan's nuisance abatement statutes may abate the interest of an innocent owner.") and at 8-9 ("Michigan's nuisance abatement statute makes it clear: innocence . . . does not excuse

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[16] Although petitioner has made a facial challenge to the Act, it is not necessary for the Court to void the entire statute in order to cure its constitutional infirmity. Declaring only section 3815(2) unconstitutional, while leaving other provisions of the Act operative, is consistent with the rule that "[a] court should refrain from invalidating more of the statute than is necessary. . . . " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citation and internal quotation marks omitted); *see also New York v. United States*, 505 U.S. 144, 186 (1992).

possible abatement of the offending property."). As such, § 3815(2) of the Act must be declared unconstitutional.

II. THE MICHIGAN STATUTE AND ITS APPLICATION TO TINA BENNIS, RESULTING IN FORFEITURE OF HER INTEREST IN THE AUTOMOBILE, VIOLATED THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

A. The Forfeiture Of Tina Bennis's Property Was A Compensable Taking Under The Fifth Amendment

The Takings Clause of the Fifth Amendment affords this Court an alternative basis for holding that the deprivation of Tina Bennis's interest in the family car without compensation was unconstitutional and that § 3815(2) of the Michigan statute is unconstitutional because it authorizes such takings.[17] Although the Court in *Pearson* rejected the facial constitutional challenge to the Puerto Rican drug forfeiture statute on takings grounds, 416 U.S. at 680, that holding is no bar to the facial and "as applied" challenges asserted here. For as discussed earlier, the Court in *Pearson* never reached the merits of the "as applied" constitutional question, *see supra*, p. 24 n.14,

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[17] The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." The Court has held that the Takings Clause was made applicable to the States by the Fourteenth Amendment. *See Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304, 315 n.5 (1994).

and its dicta on that issue actually supports the takings claim being asserted here.[18]

In suggesting that unless a property owner had some culpability (negligence) regarding the misuse of his or her property, forfeiture would be "unduly oppressive," the *Pearson* opinion cited to *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Pearson*, 416 U.S. at 690. The page of the *Armstrong* opinion cited by the Court states that the purpose of the Takings Clause is to bar the Government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. By citing to *Armstrong*, the *Pearson* Court implied that imposing a forfeiture of property on an owner free of any fault whatsoever regarding the wrongful use of his property would be making that person bear burdens which "in all fairness and justice" should "be borne by the public as a whole," and to that extent would constitute a compensable taking. Under this analysis, the Takings Clause prohibits the State from making Tina Bennis alone relinquish her property to pay for general fiscal obligations of the State or costs of local law enforcement for which she is in no way responsible.

The order granting forfeiture to the respondent directs the proceeds to be used to pay "the filing fee of this action," "attorney costs," and "all police costs," with "any remaining balance . . . [to] be paid to the general treasury of the State of Michigan." (J.A. 28). True law

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[18] As for *Pearson's* ruling on the facial challenge, that holding is readily distinguishable from the takings challenge to the section of the nuisance statute at issue here. *See infra*, pp. 32-33.

enforcement costs connected with a criminal proceeding may, consistent with the Takings Clause, be recouped from a convicted criminal's property or from the public generally. But the government cannot recover its costs of law enforcement by seizing without compensation property of any individual, who, like petitioner, is wholly innocent of the offense which necessitated the law enforcement costs. Nor can the State seize property without compensation from such a person simply to add to its "general treasury" for use in meeting fiscal obligations. Because she had neither committed nor been charged with any wrongdoing, for the State to take Tina Bennis's property (without compensation) was no more constitutional in this case than it would have been for the State to take the property of any other third person who had no involvement in John Bennis's offense.

B. The Michigan Statute Is Unconstitutional To The Extent It Authorizes The Taking Of Property Without Compensation From Non-Culpable Persons

The Michigan statute permits the direct appropriation of property of a wholly innocent person under the guise of nuisance abatement and as such authorizes a "per se" taking of property for a public use without compensation, in violation of the Fifth Amendment. And insofar as historical considerations are at all relevant to this issue, neither the history of nuisance abatement at common law, nor the history of *in rem* forfeitures of the kind at issue in *Pearson* provide a basis for suggesting that the statute is exempt from the requirements of the Takings Clause.

This Court's holding rejecting the facial challenge in *Pearson* is distinguishable from the facial challenge made here because the former rests on the view that *in rem* forfeiture statutes are not unconstitutional insofar as they apply to the property of persons innocent of *criminal* wrongdoing.[19] 416 U.S. at 683-684. The *Pearson* Court concluded on the basis of the background of *in rem* forfeiture statutes – and on the basis of several prior forfeiture decisions – that such applications of forfeiture statutes did not render them unconstitutional. But the Court simply did not decide the narrower issue of whether such statutes are constitutional if applied to persons who are not only innocent of criminal wrongdoing, but are also entirely free of any lesser culpability, including negligence. This case, by contrast, presents just that issue.

Pearson is distinguishable from this case in another important respect. The *in rem* forfeitures at issue in *Pearson* have historical underpinnings that are separate from those of public nuisance abatement statutes like Michigan's. *See Pearson*, 416 U.S. at 680-83. Thus, insofar as the *Pearson* rejection of the facial challenge was based on its reading of the history of *in rem* forfeitures, that history has no applicability to *in personam* forfeitures made pursuant to nuisance abatement statutes. Nuisance abatement has a distinct history in the common law, and that

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[19] This is what the *Pearson* Court meant when it stated that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." 416 U.S. at 683 (discussing holding in *The Palmyra*, 12 Wheat. 1 (1827)); *see also Austin*, 125 L. Ed. 2d at 502 ("In *The Palmyra* [the Court] did no more than reject the argument that the criminal conviction of the owner was a prerequisite to the forfeiture of his property.").

history affords no support for the use of forfeiture remedies against innocent owners.

Nuisance abatement has its origins in the English common law. At early common law, public nuisances were a crime, whose abatement was almost exclusively a matter for the criminal courts. The jurisdiction of equity courts to abate public nuisances at the suit of the attorney general was a relatively late development in the English common law.[20] In America, "the practice of enjoining

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[20] According to the English legal historian Holdsworth, "It was recognized, certainly by the beginning of the sixteenth century, that a nuisance might be public and remediable by indictment, or private and remediable by action on the case at the suit of the person damaged thereby." 8 W. Holdsworth, *A History of English Law* 424 (1937). The earliest common or public nuisances were obstructions or encroachments to the King's highway, which were known as purprestures. *See* F. Newark, *The Boundaries of Nuisance*, 65 L. Quart. Rev. 480, 482 (1949); J. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. Legal Stud. 403, 421 (1974). Public nuisance misdemeanors later came to include such transgressions as omitting noxious vapors or fouling common water. *See* Brenner, *supra* at 421; *see also* J. Baker, *Introduction to English Legal History* 492 (1990). The range of offenses treated as public nuisances was also expanded by statute to cover such activities as maintaining bawdy houses, gaming houses and other disorderly houses. *See* 2 J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 884 (1992). Public nuisances were subject to both fines and abatement in the criminal courts, provided the offenses were shown to be continuing. *Id.* at 883. In addition to the criminal remedy, it was recognized in the sixteenth century that a private individual could maintain an action upon the case for a public nuisance, if he could show special injury. *See* Newark, *supra* at 482-83; Baker, *supra* at 493. But recovery of damages, rather than an order of abatement, was the only relief obtainable in an action upon the case for a public or private

[public] nuisances at the suit of the state . . . became established" during "the Nineteenth Century." H. McClintock, *McClintock on Equity* 441 (1948). But even after that jurisdiction became established here, the scope of activities that constituted public nuisances – and the remedies for them – were far more limited at common law than they are under the Michigan statute.

First, where the alleged nuisance was only injurious to the morals of the community, courts seldom granted injunctions in the absence of statutes declaring those activities to be nuisances. *See* McClintock, *supra* at 441.[21] In addition, equity courts usually required some showing of "continuing or recurring" conduct amounting to a nuisance before injunctive relief would be granted. *See* 1

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nuisance. *See* Oldham, *supra* at 886. It was not until the early 1700's that the Court of Chancery began granting injunctions to abate a private nuisance, *id.* at 886, and that Court did not regularly begin doing so until the end of the eighteenth century, *see* J. McLaren, *Nuisance Law and the Industrial Revolution-Some Lessons from Social History*, 3 Oxford J. Legal Stud. 155, 186 (1983). To the extent that English equity courts began to exercise a similar jurisdiction over public nuisances in the eighteenth century, that jurisdiction was sparingly invoked. *See* A. Rounds, *Injunctions Against Liquor Nuisances*, 9 Harv. L. Rev. 521, 522-24 (1896); H. Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances*, 8 Ill. L. Rev. 19, 20-21 (1914).

[21] *See also People v. Lim*, 118 P.2d 472, 474-75 (1941) (discussing history of equitable remedy and concluding that "an action on behalf of the state . . . to enjoin activity which violates general concepts of public policy finds no basis in the doctrines of the common law"); *Hedden v. Hand*, 107 A. 285, 289 (1919) (reviewing English cases and stating that "gaming houses, bawdy houses and public nuisance of a like character . . . are . . . not within the cognizance of a court of equity") (citation omitted).

J. Pomeroy, *A Treatise on Equitable Remedies* § 513 at 863 (1905). And, finally, the remedy of "forfeiture" as it is used today is not one that was used by equity courts to abate nuisances. Instead, the usual remedy at common law was an injunction to abate the nuisance:

> The relief sought in equity against nuisance is, of course, preventive, either to prohibit the creation of a nuisance or to prevent an existing one from continuing in the future. Ordinarily, this end is achieved by a mere prohibitive injunction.

Pomeroy, *supra*, § 533 at 912-13. Such orders were to be carefully drawn so as "to prohibit only that part of the thing complained of which is injurious. . . . " *Id.* § 534 at 915. To be sure, where a mere prohibitive injunction would not accomplish the desired result, and removal or destruction of the nuisance was necessary to affording relief, a court of equity would issue a mandatory injunction providing for that relief. *See Id.* § 533 at 915. But the remedy of forfeiture, whereby the State simply appropriates property used to create a public nuisance – and either keeps it or sells it to other members of the public, who in turn re-use it – is a relatively recent statutory creation, with no support in the common law tradition. *A fortiori*, the use of forfeiture against innocent owners likewise finds no support in the common law.

In short, neither the history of *in rem* forfeiture discussed in *Pearson*, nor the history of nuisance abatement at common law provide support for broad forfeiture remedies of the kind available under the Michigan statute. Insofar as it is relevant, history does not provide any exception to the constitutional requirement that the State

pay just compensation when a statute authorizes takings of property belonging to entirely blameless persons. Section 3815(2) of the Act must be declared unconstitutional.

III. THE BURDEN OF PROOF ALLOCATION IN THE *PEARSON* DICTA SHOULD NOT APPLY TO PROCEEDINGS UNDER THE MICHIGAN NUISANCE ABATEMENT STATUTE

If this Court holds that the Michigan nuisance abatement statute is unconstitutional in that it permits forfeiture of an owner's property regardless of the presence or absence of culpability on that person's part, it should further clarify that the State must bear the burden of proving the owner's culpability.[22] The State currently bears that burden in cases where the person accused of misusing the property is its owner. *See* M.C.L.A. § 600.3825(1) ("[i]f the existence of the nuisance is established . . . "); (J.A. 53 (*Bennis* opinion) ("[w]e do not shift the burden of proof to [John Bennis] . . . ")). In its briefs before the Michigan Supreme Court, however, the State argued that if innocence were at all relevant to forfeitability, it should be made clear that the owner must bear the burden of proof on that issue. (*see* Plaintiff-Appellant's 6-9-94 Brief in the Michigan Supreme Court at 29). And even the constitutionally inadequate exemption from forfeiture formulated by the Michigan Supreme

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[22] Determining where that burden properly lies is not, however, necessary to resolve the "as-applied" constitutional challenge in this case. Regardless of who has the burden of proof on the issue, no reasonable trier of fact would conclude from the record below that Tina Bennis was culpable or blameworthy.

Court placed the burden of proving the exemption on the defendant. (J.A. 69) (stating that constitution allows forfeiture of an innocent person's property, "unless *evidence [is] submitted* that the property was stolen. . . . ") (emphasis added). A dissenting opinion also argued that the statute should be construed to place the burden of proving lack of knowledge on the defendant. (J.A. 94-95) (Levin, J., dissenting).

The issue of whether some culpability must be present before forfeiture can be effected and the issue of who has the burden of proof as to the presence or absence of that culpability are inextricably intertwined, both doctrinally and in practical terms. In protecting innocent persons from punishment, our legal tradition not only requires that an individual have some fault or culpability before punishment can be imposed. It also requires that punishment not be administered until the State has first satisfied its burden of proving that the individual engaged in a culpable act. Indeed, in criminal cases, due process makes that an absolute prerequisite to the imposition of punishment. *See, e.g., Chapman v. United States*, 500 U.S. 453, 465 (1991).

These two issues are also inseparable because shifting the burden of proof to the defendant will have the effect of eviscerating any substantive protection for innocents that this Court provides in applications of the Michigan nuisance abatement statute. *See Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation. . . . "). Thus, if a culpability standard corresponding to negligence in entrusting property is deemed to be

constitutionally required by this Court, and the State is then permitted to shift the burden to the owner, the ruling of this Court will have been largely nullified.

Although the *Pearson* dicta placed the burden of proving lack of culpability on the owner, that burden allocation was in the context of an *in rem* forfeiture, where the burden is usually on the owner. Petitioner contends that, whatever the proper rule is for *in rem* proceedings of the kind involved in *Pearson*, under either the Due Process Clause or the Takings Clause the burden of proving the constitutionally required degree of culpability must remain with the State in *in personam* forfeitures effected under the Michigan nuisance abatement statute.

A. Due Process Requires That The Burden Of Proving Culpability Be On The Government In Cases Arising Under The Michigan Nuisance Abatement Statute

Determining who has the burden of proof on a particular issue is as fundamental to the fairness of a proceeding – and to its outcome – as the selection of the appropriate standard of proof that must be met by whoever has the burden. Like the choice of the applicable standard of proof, the allocation of the burden of proof influences the relative frequency of the two types of factfinding error that can occur in judicial proceedings. *Cf. In re Winship*, 397 U.S. 358, 371 (1970) (Harlan J., concurring) (discussing effect of use of different standards of proof on factfinding error). In the context of actions brought under the Michigan nuisance abatement statute, those two types of error would be the error that a

wholly innocent person will be punished by confiscation of his or her property, and the error that a negligent person will escape that sanction.

With respect to the standard of proof in civil actions brought by the government against individuals, this Court has said that whether due process requires that the government be subject to a higher than usual standard "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). This Court has held that "fundamental fairness" requires that the government bear the "clear and convincing" standard of proof, rather than the usual "preponderance of the evidence" standard in a variety of civil contexts. *Id.* at 756-57 (mentioning cases). In those cases, the government already had the burden of proof, and the only question was how stringent that burden should be. It is manifestly clear that in civil proceedings in which the government seeks the confiscation of property the question of who has the burden of proof is as crucial to determining the "fundamental fairness" of the proceeding as was the standard of proof issue raised in *Santosky* and the cases cited therein.[23]

Inasmuch as the Court has employed the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to evaluate whether a given standard of proof comports with due

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[23] In *Santosky*, the Court held that due process requires that a State prove its allegations by at least the "clear and convincing" standard of proof in a proceeding to terminate the rights of parents in their natural children. 455 U.S. at 747-48.

process, that test is appropriate for determining whether the government must bear the burden of proving owner culpability under the Michigan nuisance abatement statute. *See Santosky*, 455 U.S. at 757; *see also United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L. Ed. 2d 490, 503 (1993) (using three-part *Mathews* test to evaluate constitutionality of *ex parte* seizure of property subject to civil forfeiture). The *Mathews* analysis requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *Id.* at 503.

An individual's right to be free from arbitrary takings of his personal property, no less than his real property, is "a private interest of historic and continuing importance." *James Daniel Good Real Property*, 126 L. Ed. 2d at 503; *see also id.* at 521 (Thomas, J., concurring in part and dissenting in part). The particular kind of property seized in this case – an automobile – is an essential part of modern life. For most Americans, some form of ownership in an automobile is a necessity of life and to many people an automobile is their most important and valuable personal possession. Automobiles provide "access to jobs, schools, and recreation as well as to the daily necessities of life." *Coleman v. Watt*, 40 F. 3d 255, 260-61 (8th Cir. 1994).

The automobile offers a perfect illustration of the fundamental interdependence between property rights and individual liberties remarked on in *James Daniel Good Real Property*, 126 L. Ed. 2d at 508 (1993), and *Lynch v.*

Household Finance Corp., 405 U.S. 538, 552 (1972). To a greater extent than perhaps any other personal property, "to deprive an individual of . . . [an automobile] is to deprive him of a measure of his autonomy. . . . " *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F. 2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). Thus, as in *James Daniel Good Real Property*, "the private interests at stake weigh heavily in the *Mathews* balance." 126 L. Ed. 2d at 504.

As for the second *Mathews* factor, both Justice Harlan's analysis in *In re Winship* and the Court's observation in *Lavine* that burden of proof allocations are frequently outcome determinative leave no doubt that the risk of an erroneous deprivation would be increased significantly by placing the burden of proof on the defendant. Presuming a person "guilty," rather than "innocent" in this context would be especially likely to lead to erroneous deprivations because of the nature of the standard of culpability involved. An owner would have to prove a negative – namely, that he or she was not negligent in entrusting property, or did not know that the user was likely to engage in an illegal use of the property. By its very nature, the kind of evidence that will disprove negligence or knowledge can be extremely difficult to acquire. The government, on the other hand, would be required to prove nothing about the owner's negligence or knowledge. Finally, the increased legal costs incurred by parties who bear the burden of proof in judicial proceedings, along with the difficulties of proof, would deter some truly innocent owners from even mounting a defense.

The third *Mathews* factor is the "[g]overnment's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *James Daniel Good Real Property*, 126 L. Ed. 2d at 504. Placing the burden of proof on the government to show culpability in cases where the owner entrusts his or her property to another will have little, if any, adverse impact on the government. Under the Michigan nuisance abatement statute, the State already has that burden with respect to cases in which the owner is the same person who misuses the property. There is no weighty governmental interest supporting different burden allocations in the two classes of cases. Finally, the purpose of a nuisance abatement proceeding is to prevent a particular misuse of property, which can be accomplished by injunctive relief. Insofar as the government also has an interest in punishing the person who created the nuisance, that interest can in any event be met through criminal actions like the one that was brought against petitioner's husband.

The conclusion that the burden should be with the State applies with particular force here because of the quasi-criminal nature of proceedings under the Michigan nuisance abatement statute. Respondent in effect acknowledged in its brief in the Michigan Supreme Court proceedings below that nuisance abatement actions of the kind involved here are the functional equivalent of a criminal proceeding. *See supra*, pp. 20-21. Therefore, the presumption of innocence that applies in criminal proceedings should apply here as well. *See Foucha v. Louisiana*, 504 U.S. at 94 (1992) (Kennedy, J., dissenting) ("We would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant

has the burden of proof."). For this additional reason, due process requires that the state bear the burden of proof on the issue of culpability.

B. In A "Per Se" Takings Case, The Government Has The Burden Of Proving Any Exception To The Requirement To Pay Just Compensation

This Court's recent takings jurisprudence provides an alternative basis for concluding that the burden of proving culpability must be with the government in the context of nuisance abatement proceedings brought against defendants like Tina Bennis. In *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992), this Court made clear that, in cases involving "per se" regulatory takings, the burden is on the government to prove any applicable exception to the requirement of paying compensation. *Id.* at 813 n.6. Even in the case of conditional takings, in which the government requires a landowner to deed portions of his or her land as a condition for receiving permission to make certain uses of the land, this Court has held that the government has the burden of "justify[ing] the required dedication." *See Dolan v. City of Tigard*, 129 L. Ed. 2d at 320 n.8.

Since forfeiture involves the taking of title by the government to a particular item of property, the government *a fortiori* must bear the burden of establishing that such a taking is not compensable under the Takings Clause.[24] Thus, in any case arising under the Michigan

[24] After setting forth its dicta concerning innocent owners, the Court in *Pearson*, citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), stated that "in this case appellee voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use." 416 U.S. at 690. In *Goldblatt*, the Court held that an ordinance regulating dredging and pit excavation within the town limits did not, as applied to appellants, amount to a compensable regulatory taking under the Takings Clause. 369 U.S. at 594. The Court, emphasizing that appellants had the burden on the issue, also held that they had failed to establish that this regulation was not a reasonable exercise of the State's police power. *Id.* at 596. The Court's recent decisions in *Dolan* and *Lucas* preclude *a fortiori* any reliance on *Goldblatt* regarding the appropriate burden allocation for cases like this one involving direct appropriations of property. *See Dolan*, 129 L. Ed. 2d at 320 n.8; *Lucas*, 120 L. Ed. 2d at 813 n. 6.

nuisance abatement statute, the government must establish the constitutionally required degree of culpability before it can forfeit the owner's property. In cases in which the government seeks forfeiture of an owner's property based on another person's misuse, that standard of culpability is negligence in entrusting the property.[25]

[25] The burden allocation suggested in the *Pearson* dicta arose in the context of *in rem* forfeitures, where there is some historical precedent for the burden shift. The practice of placing the burden of proof on a property owner in *in rem* forfeiture proceedings has been traced to the English Navigation Acts of the seventeenth century. *See* Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 Duke L. J. 821 (1984) (hereafter cited as "Note, *Due Process Implications*"). These acts required the shipping of most commodities in English vessels. *See Austin*, 125 L. Ed. 2d at 499 (discussing forfeiture imposed under English Navigation Acts). Both the "illegally carried goods as well as the ship that carried them" were subject to forfeiture

CONCLUSION

For all of the foregoing reasons, the judgment of the Michigan Supreme Court as to petitioner should be reversed.

Respectfully submitted,

STEFAN B. HERPEL
Attorney at Law
206 S. Fifth Ave., Suite 200
Ann Arbor, Michigan 48104
(313) 930-0852

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upon a violation of the Act. *Id.* at 499. Obtaining jurisdiction over shipowners (some of whom were undoubtedly not English nationals) to enforce these laws was difficult. *See* Note, *Due Process Implications* at 825. The use of *in rem* proceedings, in which the ship itself was seized to satisfy a claim, and in which the burden of proof was on the vessel's owner, alleviated that problem. *Id.* The First Congress "passed laws subjecting ships and cargos involved in customs offenses to forfeiture," *Austin*, 125 L. Ed. 2d at 500, and these, too, contained the burden-shifting feature, *see* Note, *Due Process Implications* at 825-26 (1984). The current customs forfeiture statute in the United States Code shifts the burden of proof to the owner of seized goods. 19 U.S.C. § 1615. That burden-shifting provision has, *inter alia*, been incorporated in the federal drug forfeiture statute by subsection (d) of 21 U.S.C. § 881, which served as the model for the Puerto Rican statute at issue in *Pearson*. *See* note 6, *supra*. Whatever relevance the history of *in rem* statutes may have to the constitutionality of burden shifting under *in rem* forfeitures of the kind involved in *Pearson*, it clearly has no relevance to the constitutionality or propriety of burden-shifting in a proceeding arising under a nuisance abatement statute.

APPENDIX

Sections 3801, 3805, 3815, 3825, 3830, and 3835 of the Michigan Public Nuisance Statute, as codified in Michigan Complied Laws Annotated, provide as follows:

600.3801. Declared nuisances; abatement

Sec. 3801. Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

600.3805. Action to abate; parties

Sec. 3805. The attorney general of the state of Michigan, the prosecuting attorney or any citizen of the county, may maintain an action for equitable relief in the name of the state of Michigan, upon the relation of such attorney general, prosecuting attorney or citizen to abate said nuisance and to perpetually enjoin any person, his servant, agent, or employee, who shall own, lease, conduct or maintain such building, vehicle, boat, aircraft or place, from permitting or suffering such building, vehicle, boat, or aircraft or place owned, leased, conducted or maintained by him, or any other building, vehicle, boat, aircraft or place conducted or maintained by him to be used for any of the purposes or by any of the persons set forth in section 3801,[1] or for any of the acts enumerated in said section. When the injunction has been granted, it shall be binding on the defendant throughout the judicial circuit in which it was issued.

[1]Section 600.3801.

600.3815. Admissible evidence; unnecessary proof; judgment and order

Sec. 3815. (1) In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance.

(2) Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required.

(3) It is not necessary for the court to find the property involved was being used as and for a nuisance at the time of the hearing, or for the plaintiff to prove that the nuisance was continuing at the time of the filing of the complaint, if the complaint is filed within 30 days after any act, any violation, or the existence of a condition herein defined as a nuisance, but on finding that the material allegations of the complaint are true, the court shall render judgment and order of abatement as hereinafter provided.

600.3825. Order of abatement; closing of building, removal of contents, sale; contempt

Sec. 3825. (1) **Order of abatement.** If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all furniture, fixture and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released as in this chapter provided.

(2) **Vehicles, sale.** Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.

(3) **Sale of personalty, costs, liens, balance to state treasurer.** Upon the sale of any furniture, fixtures, contents, vehicle, boat or aircraft as provided in this section,

the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities which may be established by intervention or otherwise at the hearing or in other proceedings brought for that purpose as being bona fide and as having been created without the lienor having any notice that such property was being used or was to be used for the maintenance of a nuisance as herein defined, and shall pay the balance to the state treasurer to be credited to the general fund of the state.

(4) **Use of closed building; contempt**. If any person uses a building or place so directed to be closed, with knowledge that such building or place is closed by order of the court, he shall be punished as for contempt, as provided in section 3820.[1]

[1]Section 600.3820.

600.3830. Removal and sale of property, fees; closing of building; loss of exemptions; liability of officers

Sec. 3830. (1) **Fees**. For removing and selling the movable property, the officer is entitled to charge and receive the same fees as he would for levying upon and selling like property upon execution, and for closing the building or place and keeping it closed, a reasonable sum shall be allowed by the court.

(2) **Loss of property exemptions; liability of officers.** Any person found guilty of maintaining a nuisance under the provisions of this chapter shall forfeit the benefit of all property exemptions, so far as the satisfaction of

the order or judgment of the court requires the same, and the taking and disposing of any property of the defendant or defendants by virtue of such order or judgment by any officer directed to execute the same is not a trespass, nor shall such officer be liable either civilly or criminally therefor, if a proper return of such order or judgment and accounting for such property is made to the court within 10 days after the order or judgment is executed.

600.3835. Proceeds of sale of personalty, application

Sec. 3835. The proceeds of the sale of the personal property, as provided in section 3830,[1] shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the persons entitled thereto as the court may direct.

[1]Section 600.3830.